JAN 3 2001

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No. 99-2047

In the Supreme Court of the United States

ANTHONY PALAZZOLO, PETITIONER

v.

RHODE ISLAND, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Rhode Island permissibly treated petitioner's takings claim as unripe, where that takings claim was based on the State's purported refusal to allow large-scale residential development on petitioner's property and petitioner had never sought permission from the appropriate state officials to construct residences.

2. Whether petitioner can establish a taking of property through proof that his land would dramatically increase in value if longstanding development restrictions were removed, even though the restrictions were in effect at the time petitioner acquired the property and the land retains substantial value notwithstanding the restrictions.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents both procedural and substantive questions concerning the application of the Just Compensation Clause of the Fifth Amendment to restrictions on development in coastal wetlands. The Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.*, establishes a national policy of protecting the resources of the Nation's coastal zone and encouraging States to adopt coastal management programs that, *inter alia*, seek to provide for "the protection of natural resources, including wetlands." 16 U.S.C. 1452(2)(A). In addition, federal agencies are vested by various statutes with the responsibility to determine the scope and type of development that will be permitted in environmentally sensitive areas, including wetlands.

STATEMENT

1. The site at the center of this dispute consists of some 18 acres of coastal wetlands, and an adjacent area of "no more than a few additional upland acres," in the Town of Westerly, Rhode Island. Pet. App. A2, A3 n.1. In 1959, petitioner, along with two business associates, purchased the site for $8000 and transferred it to Shore Gardens, Inc.

(SGI). See *id.* at A2, B2. Petitioner was president of SGI; in 1960, he became sole shareholder. *Id.* at A2. The Town approved a plat subdividing the site into 80 lots; 11 of those, "apparently in the upland area of the parcel," were sold to various purchasers, for amounts that are not clear on the record. *Ibid.* In 1969, SGI re-acquired five of the lots for $5000. *Id.* at A2, B2. Houses have been built on at least some of the other six lots. J.A. 79. In February 1978, SGI's corporate charter was revoked because annual reports required by state law had not been filed. Def. Exh. Y; see Pet. App. A3, B4.

As the Rhode Island Supreme Court explained,

> [s]ome of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.

Pet. App. A3. In 1962 and 1963, petitioner applied for permission to fill the site with material dredged from Winnapaug Pond. *Id.* at A3, B2.[1] In 1966, he filed a new application, seeking permission to dredge the Pond and fill tidal marshland areas in order to construct a recreational beach facility. *Id.* at A4, B2. In 1971 the State's Division of Harbors and Rivers (DHR) authorized petitioner to proceed with one plan or the other. *Id.* at A4, B2-B3. Shortly

[1] "At the time of these two applications, there was no statutory requirement that any state agency approve the filling of coastal wetlands, but a party wishing to dredge a river or pond was required to gain approval of [the State's Division of Harbors and Rivers (DHR)]." Pet. App. A3-A4. In 1965, however, the Rhode Island legislature enacted new statutory provisions that transferred the DHR to the newly-created Department of Natural Resources (DNR) and gave the DNR the authority to restrict filling in coastal wetlands. *Id.* at A3 & n.2, A4.

thereafter, however, the agency revoked that approval. *Id.* at A4, B3. Petitioner did not appeal from or otherwise challenge that decision. *Ibid.*

In 1971, the Rhode Island legislature created the Coastal Resources Management Council (CRMC) and gave that body authority to regulate filling of coastal wetlands. R.I. Gen. Laws §§ 46-23-1 *et seq* (1956). In 1972, Congress enacted the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* The CZMA establishes a national policy of protecting the resources of the Nation's coastal zone. The Act encourages States to adopt coastal management programs that, *inter alia*, seek to provide for "the protection of natural resources, including wetlands." 16 U.S.C. 1452(2)(A).

In 1977, the CRMC promulgated the Coastal Resources Management Program (CRMP). The CRMP generally prohibits the filling of coastal wetlands (like petitioner's) adjacent to Type 2 waters. See CRMP § 210.3C. The CRMP provides, however, for "special exceptions," under which an applicant may obtain permission to fill such wetlands by demonstrating, *inter alia*, that the project provides benefits "to the public as a whole as opposed to individual or private interests." *Id.* § 130A(1).

In 1983, petitioner applied to the CRMC for permission to construct a bulkhead on the shore of the Pond and fill the wetlands on the site. Pet. App. A5, B3. The stated purpose of the project was to control erosion. J.A. 60. The proposed filling activities would have included areas both above and below the mean high water mark. J.A. 60-61. Testifying before a subcommittee of the CRMC, petitioner refused to identify the use that he intended to make of the property if it was filled. J.A. 10-11. The CRMC denied the application. J.A. 14-19. The agency's decision explained that "[d]rawings submitted and on file at our office are vague and inadequate for a project of this size and nature," J.A. 16; that "the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond," J.A. 17; and that

the record revealed "a complete lack of evidence demonstrating to this Council the need and demand for the proposed activity," *ibid.*

In 1985, petitioner filed a new application to fill approximately 12 acres of wetlands on the property in order to construct a private beach club, including parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbecue pits, and trash receptacles. See J.A. 20-21, 25. Based in part on biological and engineering reports assessing the suitability of the location for the proposed activities (see J.A. 20-23), the CRMC denied the application. J.A. 25-30. The CRMC explained, *inter alia*, that "[t]he highly compressible nature of mucky peat makes this soil complex undesirable for parking or roadway base. The Rhode Island Soil Survey for the area notes a Poor Rating. Additionally, storm surge flooding and recession would cause major sedimentation within the Pond." J.A. 26. The CRMC also observed that "[f]illing of the marsh would destroy the natural shoreline protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area." J.A. 27. The Council concluded that petitioner had failed to establish that the proposed project would be consistent with the CRMP and that his application should therefore be denied. J.A. 27-29. The state superior court sustained the CRMC's decision. See J.A. 31-42.

2. In 1988, petitioner filed an inverse condemnation action in the state superior court, contending that the CRMC's denial of his development applications had effected a taking of property without just compensation, in violation of the United States and Rhode Island Constitutions. Pet. App. A5, B3-B4; see J.A. 43-46 (1995 amended complaint). Petitioner "sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes." Pet. App. A5.

The superior court dismissed the suit. Pet. App. B1-B13. The court found that petitioner "as the sole stockholder of SGI was not the owner of the subject property until 1978, when the Secretary of State revoked SGI's corporate status." *Id.* at B8. The court held that "[b]ecause [petitioner] obtained title to the subject property in 1978, and because the regulations that prohibited the filling of wetlands were in place at that time, [petitioner] cannot prevail in his claim that the CRMC's actions constituted a categorical taking of his property when it denied the [petitioner's] 1985 application to fill wetlands on the subject property." *Id.* at B9. The court also noted that uncontradicted evidence introduced at trial indicated that the upland portion of the property was suitable for development; that the property if developed would have a value of approximately $200,000; and that the property would have a value of approximately $157,500 as an open-space gift. *Id.* at B9-B10.

As an alternative basis for its decision, the trial court concluded that petitioner could not establish a compensable taking even if he could prove a loss of all beneficial use of the property, since his proposed development would constitute a public nuisance. The court explained:

> The CRMC introduced evidence that the filling of 18 acres of salt marsh would reduce the existing salt marsh in Winnapaug Pond by 12 percent. In addition, the evidence showed that a 12 percent reduction in the salt marsh in Winnapaug Pond would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island. Moreover, the evidence indicated that the 12 percent loss of the total salt marsh filtering in the Winnapaug Pond will have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected to result in increased harmful nitrate levels within the pond. The evidence illustrated that high levels of nitrate in

> groundwater poses a public health threat because groundwater is the sole source of drinking water. Therefore, based on evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater, and based on the evidence that the [petitioner's] proposal would not be suitable for the locality of the subject property, this Court finds that the [petitioner's] proposal would constitute a public nuisance.

Pet. App. B10-B11.

3. The Supreme Court of Rhode Island affirmed. Pet. App. A1-A18.

a. The court first held that petitioner's takings claim was not ripe for review. Pet. App. A9-A12. It explained that

> although [petitioner] claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision. His 1966 and 1985 applications sought to fill the wetlands so he could construct a beach club. His 1963 and 1983 applications sought permission to fill the wetlands, with no statement describing what he intended to do with the land when it was filled. In fact, during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land. Because [petitioner] has not applied for permission to develop a seventy-four-lot subdivision, he has not received a "final decision regarding the application of the regulations to the property at issue."

Id. at A11 (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985)).

The court's ripeness holding was also based in part "on the fact that [petitioner] has not sought permission for less ambitious development plans." Pet. App. A11. The court stated that "[u]ntil [petitioner] has explored development options less grandiose than filling eighteen acres of salt marsh, he cannot maintain a claim that the CRMC has

deprived him of all beneficial use of the property." *Id.* at A11-A12.

b. While noting that its "determination that the claim was not ripe is dispositive of the case," the Rhode Island Supreme Court also "briefly discuss[ed] the merits of [petitioner's] claim." Pet. App. A12. The court sustained the trial court's finding that petitioner had not been deprived of all beneficial use of the property in question. *Id.* at A12-A13. The court relied on the "undisputed evidence * * * that had [petitioner] developed the upland portion of the land, its value would have been $200,000," and noted that petitioner's allegation of an anticipated profit of $3,150,000 was "speculative." *Id.* at A13.[2] The court also stated that "when [petitioner] became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Id.* at A15. Finally, the court held that petitioner could not establish a taking under the multi-factor test established by this Court's decision in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978), explaining that petitioner's "lack of reasonable investment-backed expectations is dispositive in this case." Pet. App. A17.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that a regulatory takings claim is generally unripe until the landowner has

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[2] The court explained:

> It was revealed at oral argument that the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres. Further, there was no evidence that [petitioner] would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require. Thus, it is clear that his anticipated "profit" was unrealistically optimistic.

Pet. App. A13 n.7.

sought permission to develop his property and has received a final decision from the relevant land-use agency. As in other areas of administrative law, enforcement of ripeness principles protects the agency from premature judicial interference, and it ensures that if litigation is ultimately required, the reviewing court will have the benefit of the agency's expertise.

In the instant case, the Supreme Court of Rhode Island reasonably concluded that petitioner's takings claim was unripe. Petitioner's 1985 application for permission to construct a beach club did not propose any form of residential development, and it contemplated filling of a substantial majority of the wetlands on the parcel. Notwithstanding the agency's denial of that application, substantial uncertainty remains concerning the type and extent of development that would be permitted on petitioner's property. And because petitioner's 1985 beach club application bore no resemblance to the hypothetical subdivision that formed the basis of his takings claim, the trial court was forced to rely on extrinsic evidence regarding the manner in which the CRMC and other land-use regulators would likely have applied their rules to development proposals that petitioner never presented to the appropriate agency.

II. If this Court concludes that the Supreme Court of Rhode Island was required to regard petitioner's takings claim as ripe, that claim nevertheless fails on the merits. The current value of petitioner's property is many times the amount that SGI paid for it. Petitioner has wholly failed to demonstrate that Rhode Island's adoption of wetlands protective measures has caused any *diminution* in the value of his parcel; his claim is simply that the tract would have appreciated much more dramatically if development on the site were unrestricted. That claim, even if true, would be patently inadequate to establish a compensable taking.

The Supreme Court of Rhode Island noted that petitioner had acquired the subject property after the State's adoption

of the CRMP, and it treated that fact as an independent ground for rejecting petitioner's takings claim. We agree that where a purchaser chooses to acquire property that is subject to heightened regulatory oversight, application of the pre-existing regime does not subject the owner to the type of unfairness that must underlie a regulatory takings claim. That is especially so where, as here, the regulatory regime codifies background principles of public nuisance law. Petitioner contends that a person who acquires property after a regulatory restriction has been imposed thereby acquires the right to pursue any regulatory takings claim that the *prior* owner might have asserted. But plainly no general rule exists that every potential constitutional claim must be freely and fully assignable. In any event, petitioner has entirely failed to establish that SGI—the prior owner of the subject property—had any takings claim to assign.

ARGUMENT

As this Court recognized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Rather, until the Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). This Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a compensable taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019. In particular, regulation that deprives the owner of all economically beneficial use of land typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

Id. at 1015-1016.[3] In determining whether a regulatory measure goes "too far," thereby effecting a compensable taking, the court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 185 (1985).

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); see also *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984). Where a landowner actively seeks to use his property, and is prevented from doing so by regulation so severe as to deprive the land of all beneficial use, the Fifth Amendment's just compensation requirement prevents the costs of that regulation from being unfairly concentrated on discrete individuals. In adjudicating claims for just compensation, however, courts should be cognizant of the danger that landowners with no actual interest in developing their property, or no realistic prospect of doing so, may hypothesize development activities that they know to be prohibited, and then seek "compensation" for the ban. A judicial order mandating payment in that circumstance would not serve to distribute more equitably the burdens of government regulation; it would confer a windfall upon a landowner who has in fact suffered no constitutionally cognizable injury, at the expense of the community as a whole.

In the instant case, petitioner's claim of a compensable taking is premised on the assertion that the State's regulatory scheme has prohibited him from constructing a

[3] The Court has similarly concluded that regulation will be deemed a per se taking if it entails a permanent physical occupation of real property. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-435, 441 (1982).

74-unit residential development on his parcel. Yet petitioner never submitted an application for any residential development, and nothing in the record suggests that petitioner had any actual desire or ability to undertake such a major project. Petitioner has also failed to establish (or even to allege) that the State's adoption of wetlands regulations rendered the subject property less valuable than it had previously been. Finally, those wetlands regulations, which are firmly rooted in background principles traditionally reflected in nuisance law, were already in effect when petitioner succeeded to ownership of the property in 1978. For each of those independent reasons, the judgment of the Supreme Court of Rhode Island should be affirmed.

I. THE SUPREME COURT OF RHODE ISLAND PERMISSIBLY HELD THAT PETITIONER'S CLAIM FOR JUST COMPENSATION WAS UNRIPE

A. This Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186; accord, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.").[4] That rule "responds to the high degree of discretion characteristically possessed

[4] A "facial" takings challenge—*i.e.*, a contention that the mere enactment of a statute or regulation effects a taking of property–is "generally ripe the moment the challenged regulation or ordinance is passed." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997). Such a challenge "face[s] an uphill battle" (*ibid.*), however, and petitioner does not contend that the mere enactment of the CRMP (or any predecessor wetlands protective measure) effected a taking of his property.

by land-use boards in softening the strictures of the general regulations they administer," which makes it particularly difficult for a court to assess the extent of development that will be permitted simply through inspection of the pertinent statutes and regulations. *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997); see also *MacDonald*, 477 U.S. at 350.

At least in its general outlines, the Court's treatment of takings claims is consonant with ripeness principles that apply in other settings. In the context of the Administrative Procedure Act (APA), for example, this Court has held that

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). Ripeness principles serve in part to protect the courts from involvement in litigation that might turn out to be unnecessary if the administrative process alleviates the plaintiff's concern. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 736 (1998); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980). Adherence to those principles also ensures that if judicial involvement is ultimately required, the nature and practical consequences of agency policy will be clear to the reviewing court. See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967) ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here").

B. The instant case arises out of an inverse condemnation action filed by petitioner in a Rhode Island trial court. This Court has described as "unassailable" the general rule that "States may establish the rules of procedure governing litigation in their own courts." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). The application of state procedural rules to federal claims may be preempted if those rules "impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* at 150 (quoting *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 298-299 (1949)).[5] State courts nevertheless have a degree of latitude to apply their own procedural rules to claims arising under federal law, even where state rules differ from those governing litigation in the federal courts, and even where the effect of a state rule is to preclude adjudication of a claim that a federal court would have found appropriate for resolution. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). Thus, in order to obtain reversal of the state court's ripeness holding, petitioner must demonstrate that some principle of federal law required the Supreme Court of Rhode Island to treat his takings claim as ripe, notwithstanding this Court's customary deference to state court procedural requirements. Petitioner has failed to make that showing.

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[5] State courts may not refuse to adjudicate a federal cause of action based on disagreement with the content of federal law. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990). But nothing of that sort has happened here. Petitioner raised takings claims under both the United States and Rhode Island Constitutions, see Pet. App. A2, and the Supreme Court of Rhode Island drew no distinction between the federal- and state-law claims.

C. Petitioner's takings claim is premised on the CRMC's denial of his 1985 application for permission to fill approximately 12 acres of wetlands to construct a beach club. See Pet. Br. 8 n.3. Notwithstanding the agency's denial of that application, however, "the nature and extent of permitted development" (*MacDonald*, 477 U.S. at 351) on petitioner's property remain far from clear. That application did not propose any form of residential development, and it contemplated filling of a substantial majority of the wetlands on the parcel. In addition, the 1985 beach club proposal did not involve any development of the upland segment of the property, which retained development potential even if all filling of the wetlands was prohibited.

Petitioner contends (Br. 13) that "the uncontradicted evidence was that CRMC *would* continue to deny [petitioner] permission to alter any of the 18 acres of wetlands, thereby precluding any development of that portion, but *would not* deny him permission to build one single-family home on the small upland portion of his property." He asserts on that basis that the "type and intensity of development legally permitted on [petitioner's] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 13 (internal quotation marks omitted). The record does not support that assertion.

The record contains evidence of at least *two* upland areas on petitioner's property. See Tr. 190-191, 199-200, 210-212, 610. Because petitioner never sought permission to undertake residential development on any portion of the land, neither the CRMC nor other relevant agencies (see pp. 16-17 & note 8, *infra*) were ever called upon to determine the extent of allowable construction. But there was surely a realistic prospect that petitioner might have received permission to build several houses on the upland areas of the site.[6]

[6] Nothing in the pertinent state court opinions is to the contrary. The trial court identified uncontradicted testimony indicating that one upland area was suitable for development and that the CRMC would have approved that location as a home site. Pet. App. B5, B9. The Supreme Court of Rhode Island likewise referred to "undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." *Id.* at A11 (emphasis added). Both the trial and appellate courts regarded that evidence as dispositive refutation of petitioner's takings claim. But neither court found that one single-family home was the *maximum* development that would be permitted on the property.

Even with respect to the wetlands portion of the subject property, the record does not establish that the CRMC's denial of petitioner's 1985 permit application was premised on an absolute ban on the placement of fill. The CRMP generally prohibits the filling of wetlands adjacent to Type II waters, see CRMP § 210.3C, but it expressly provides that "[s]pecial exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the requirements of [the CRMP]," *id.* § 130A. To receive a special exception under Section 130, the applicant must demonstrate, *inter alia*, that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." *Id.* § 130A(1).

The evidence at trial indicated that in dealing with a *different* applicant, the CRMC took the position that residential housing does not serve a "compelling public purpose" within the meaning of CRMP § 130A(1). See J.A. 73. The record does not make clear whether the CRMC regarded that principle as a categorical rule, or whether it was subject to possible exceptions (*e.g.*, where minimal fill in wetland areas would facilitate development of the uplands portion of a tract). Had petitioner truly been interested in making productive use of the wetlands portion of his tract, he could have devised an alternative project, perhaps involving less substantial filling activities, and then sought to persuade the CRMC that such a project qualified for a special exception

under CRMP Section 130A(1). For these reasons, the record in this case leaves significant doubt as to the type and extent of development that would have been permitted on petitioner's tract, including both its upland and wetlands portions.[7]

D. In other respects as well, the state courts' consideration of petitioner's takings claim would have been meaningfully assisted if petitioner had announced his intention to construct residential units and had sought the permits necessary to pursue that scheme. Most obviously, such applications could have provided some assurance that petitioner actually desired and had the means and technical capacity to undertake large-scale residential development.[8]

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[7] Petitioner places substantial emphasis (see, *e.g.*, Br. 12) on the trial court's statement that "[petitioner] testified that the CRMC informed him that any proposal involving the filling of wetlands would be denied." Pet. App. B5. Even if the trial court's description of the evidence were accurate, petitioner's own hearsay testimony concerning the CRMC's likely response to a hypothetical development proposal would be a patently inadequate means of establishing the agency's formal and official position with respect to petitioner's land. In any event, the trial court's characterization of petitioner's testimony is inaccurate. Petitioner acknowledged on cross-examination that he had never submitted a permit application for residential development involving less than the full 18 acres of wetlands. See Tr. 111-113. Petitioner did present evidence concerning a discussion between himself and a CRMC biologist, who stated that even a more limited fill proposal (*e.g.*, for reduced residential development) would not be approved unless petitioner could establish that the project would result in public rather than purely private benefits. See Tr. 116-120. But petitioner clearly did not understand the agency to have expressed a categorical opposition to any filling on the wetlands segment of the parcel. To the contrary, the conversation in question occurred *before* petitioner submitted his 1985 beach club application. Tr. 120.

[8] Under Rhode Island law, an applicant's intended use is an essential part of his application, see CRMP § 300.1 (requiring that an applicant describe the "need" for the activity), and substantially different prerequisites and standards may apply depending on the nature of the proposed development. An applicant for a residential development permit must first obtain a local building permit and an individual sewage disposal system (ISDS) permit from the Rhode Island Department of Environmental Management. *Id.* §§ 300.3(B)(1) and (2), 320(C)(6). The ISDS permit application requires the landowner to submit a "topographic map of details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and, if necessary, also assessment on environmental impacts," as well as "various details on the septic system design" proposed. J.A. 51; see also J.A. 66.

Enforcement of ripeness principles thus helps to ensure that any takings award is truly "compensation" for actual injury to the landowner, rather than a windfall based on hypothetical development activities that would not have occurred even in the absence of the contested regulatory scheme.

In addition, if petitioner had identified large-scale residential development as the purpose of his proposed filling activities, the CRMC's consideration of his application might have identified other, independent barriers to that potential use of his parcel. The CRMC would likely have declined to consider petitioner's application for permission to conduct fill activities for residential development until he obtained the necessary septic and building permits. See J.A. 66-68; CRMP § 300.3(B); note 8, *supra*. The septic systems needed for a 74-unit residential development would have discharged significant amounts of nutrients into Winnapaug Pond. J.A. 56-57. Even a small increase in nutrient loadings could produce eutrophication, a condition in which growth of microorganisms leads to a lack of oxygen in the water, potentially harming shellfish stocks, causing fish kills, and causing a range of other harms. J.A. 83-90. The Supreme Court of Rhode Island also noted that the wetlands on petitioner's property "provide[] a buffer for flooding," Pet. App. A3, and testimony at trial indicated that filling the wetlands could increase flood risks to neighboring property and that houses and septic systems could become projectiles in a flood. Tr. 179-181, 567-568.[9]

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[9] Petitioner suggests (Br. 3, 23, 42, 49) that construction of residences on filled wetlands has been a common practice in the area where his property is located, and that the effect of the CRMP is therefore to

This Court has made clear that any use of real property constituting a public or private nuisance under traditional state-law principles may be prohibited without the payment of compensation even if the effect of the ban is to deprive the land of all beneficial use. *Lucas*, 505 U.S. at 1029-1031; see also *id.* at 1035 (Kennedy, J., concurring in the judgment) (agreeing that "nuisance prevention accords with the most common expectations of property owners who face regulation," while stating that "[c]oastal property may present such unique concerns for a fragile land system that the State

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deprive him of "development rights" that his neighbors have enjoyed. Those suggestions are not supported by the record. In the first place, even if petitioner or SGI might have had some *expectation* (at some point in the past) that they would at some point be able to engage in extensive filling of their coastal wetlands, it would not follow that they had obtained a distinct *property right* under state law to do so. In any event, at trial, petitioner acknowledged on cross-examination that, with possible isolated exceptions, the practice within the community has been to leave the marsh undeveloped. Tr. 98-99; see also Tr. 188-190. The aerial photographs submitted in Joint Lodging 2 confirm the largely undeveloped character of the surrounding wetland areas. A biologist's field report prepared in connection with petitioner's beach club application stated that "[t]he site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond. An estimation of total continuous salt marsh area at south shores of the pond is 220± acres, with an additional 100± acres at southwest shores. *That this wetland complex is large, continuous and has remained relatively non-fragmented despite development pressures in the area is important in its value assessment.*" Pl. Exh. 10, at 2 (emphasis added). Petitioner quotes the statement in the Biologist's Field Report that "[l]and uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings." Pet. Br. 3. Petitioner omits the final clause of that sentence, however, which states that "impacts are at present associated with development of buffering back dune areas to the north side of Atlantic Avenue." Pl. Exh. 10, at 2. The available evidence strongly indicates that while considerable development has occurred within the region as a whole, the *wetlands* areas have remained largely untouched. The case is therefore quite different from *Lucas*, where the landowner simply sought permission "to do what the owners of the immediately adjacent parcels had already done." 505 U.S. at 1008.

can go further in regulating its development and use than the common law of nuisance might otherwise permit"). If petitioner had sought permission to undertake the large-scale residential development that forms the basis for his takings claim, the court's consideration of the CRMC's "nuisance prevention" defense to petitioner's takings claim would have been significantly informed by the views of the expert agencies responsible for addressing potential nuisance activities in the State's sensitive coastal area regarding the likely impacts of that form of development. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (exhaustion requirement is "manifestly reasonable" where it allows the agency to determine whether the claims are "invalid for other reasons").

The trial court found that the filling of petitioner's 18 acres of wetlands *would* constitute a public nuisance, noting that this Court had stated in *Lucas* that the nuisance inquiry properly includes an analysis of "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question." Pet. App. B10 (quoting *Lucas*, 505 U.S. at 1030-1031). Applying that analysis here, the trial court found that the filling petitioner proposed would constitute a nuisance because it "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island"; would "have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected to result in increased harmful nitrate levels within the pond"; would therefore "pose[] a public health threat because groundwater is the sole source of drinking water"; and "would not be suitable for the locality of the subject property." *Id.* at B10-B11. The trial court's analysis of the nuisance question focused exclusively on the likely environmental effects of the filling itself; the

court did not assess the *additional* harms that might result (*e.g.*, through the operation of septic systems) from the construction and occupancy of a large residential subdivision.[10]

E. The method by which petitioner attempted to establish a taking thus predictably created the very ambiguities and inefficiencies that ripeness requirements are intended to avoid. If petitioner had actually sought permission to undertake the residential construction that now forms the basis for his takings claim, his application would have triggered formal agency processes focusing on that form of development, culminating in a final decision by the agency itself that could then have furnished the basis for judicial review. But because petitioner's 1985 beach club application bore no resemblance to the hypothetical residential subdivision, the trial court was forced to rely on extrinsic evidence regarding the manner in which the CRMC and other land-use regulators would likely have applied their rules to a development project that petitioner never presented to them. The requirement that a takings claimant obtain from the responsible agency a "final decision regarding the application of the regulations to the property at issue" before filing suit, *Williamson County*, 473 U.S. at 186, exists precisely to avoid the need for that sort of conjectural inquiry.

[10] Other preexisting restrictions on development of areas below mean high water and of the wetlands on the site further support the State's view that petitioner has no reasonable investment-backed expectation that he would be able to place fill on the site, and that prohibitions resulting from the CRMP are firmly rooted in state and federal law defining property and in background principles of nuisance law. A substantial portion of the site is below mean high water. Pet. App. A3; Tr. 463-479; Joint Lodging 2. That fact appears to render the Rhode Island public trust doctrine applicable, see Br. in Opp. 20, and also means that the federal navigational servitude applies. *Willink* v. *United States*, 240 U.S. 572 (1916). Moreover, since 1899, construction in navigable waters has been subject to the approval of the Army Corps of Engineers under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403; for purposes of that statute, the term "navigable waters" refers to areas below mean high water. *Willink*, 240 U.S. at 580; *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 748 (9th Cir. 1978). Finally, the placement of fill into wetlands that drain into bodies of water such as Winnapaug Pond requires federal approval under Section 404 of the Clean Water Act, 33 U.S.C. 1344, which was enacted in 1972. The regulation of such wetlands by the Corps of Engineers was based on an assessment that they, along with the body of water to which they are adjacent, are part of a single aquatic system and that pollution of the wetlands will affect the system as a whole. See *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).

II. PETITIONER CANNOT ESTABLISH A TAKING OF PROPERTY SIMPLY BY PROVING THAT HIS LAND WOULD DRAMATICALLY INCREASE IN VALUE IF DEVELOPMENT RESTRICTIONS THAT PREDATE HIS ACQUISITION OF THE LAND WERE ELIMINATED

If this Court nevertheless concludes that the Supreme Court of Rhode Island was required to regard petitioner's takings claim as ripe, that claim fails on the merits. In finding that petitioner had failed to establish the existence of a total taking, the superior court relied in part on evidence presented at trial indicating that the subject property would have a value of $200,000 if a single-family residence were constructed on the uplands portion. See Pet. App. B9-B10. That value is scarcely trivial in any absolute sense, and it is far more than petitioner and SGI initially paid for the property. Petitioner nevertheless seeks to establish the existence of a taking by comparing that amount to the value ($3,150,000) that he alleges the property would have if large-scale residential development were permitted. See, *e.g.*, Pet. Br. 40 (asserting that the CRMC's regulatory actions have "result[ed] in the 93.7% loss of present value" of petitioner's tract); *id.* at 37.[11] For the reasons that follow, that comparison is not an appropriate basis for a regulatory takings claim.

[11] Petitioner also suggests (Br. 46) that the denial of economically beneficial use of the wetlands portion of his tract is itself a sufficient basis for concluding that a taking has occurred. That claim fails for several reasons. First, petitioner has failed to demonstrate that the wetlands

A. This Court's decision in *Lucas* v. *South Carolina Coastal Council*, *supra*, strongly suggests that even a 93.7% diminution in the value of real property resulting from the imposition of new land-use restrictions is not sufficient to establish a categorical taking. The Court acknowledged that a "landowner whose property is diminished in value 95% * * * might not be able to claim the benefit of [the Court's] categorical formulation," and that "in at least *some* cases the landowner with 95% loss will get nothing." *Id.* at 1019-1020 n.8 (internal quotation marks omitted). That discussion indicates that even a drastic diminution in the value of real property is insufficient to establish a categorical or "total" taking, especially if the property retains some economically beneficial use. And there can be no doubt that construction of even a single house on a residential tract constitutes "economically beneficial" use of real property.[12]

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areas are entirely unusable. See pp. 15-16, *supra*. Second, it is well-established that "total taking" analysis involves examination of the parcel as a whole. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 n.6 (1994); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978). Though some applications of that rule may involve difficult line-drawing problems, see *Lucas*, 505 U.S. at 1016-1017 n.7, petitioner did not contend either in his brief to the state supreme court or in his petition for certiorari that the wetlands portion of his tract constituted a separate parcel. The pattern of development in the region—significant development in the upland areas, with the wetlands substantially untouched, see note 9, *supra*—belies any suggestion that wetland areas near Winnapaug Pond have traditionally been regarded as separate developable parcels. Furthermore, to the extent it is appropriate to assess the effect of state law on petitioner's predecessor, SGI, the entire tract acquired by SGI would have to be considered. As noted above, SGI sold a number of lots in that tract for homesites and thus was able to realize significant development potential from the outset.

[12] Invoking the phrase "economically viable use" in some of this Court's cases, petitioner argues that the State must allow development, even in wetlands that are not suited to development in their natural state, that would enable the owner to earn a positive return on his investment in the land. See, *e.g.*, Pet. Br. 42-44. This Court has never held that the Just Compensation Clause embodies such a guarantee. The phrase "economically viable use" was derived from *Penn Central*, where the challenged law required that the structure be used as a railroad terminal; in that setting, the Court simply noted that the owners could obtain relief if the ongoing operation of the building for that mandated purpose ceased to be "economically viable." See 438 U.S. at 138 n.36; cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 118 (1974) (describing claim of "erosion taking" resulting from limitations on discontinuance of unprofitable rail operations). The Court has not suggested any such principle outside the context of a specified use for an already existing structure. In *Lucas*, for example, the Court identified the relevant inquiry to be whether the landowner was deprived of all economically "beneficial" or "productive" use. See 505 U.S. at 1016 n.6, 1017, 1018. As we have explained in the text, petitioner has not been deprived of all beneficial or productive use of his land.

B. The more fundamental defect in petitioner's theory, however, is that the comparison on which he relies wholly fails to establish that the adoption of the CRMP caused his property to *diminish* in value. The superior court observed that "[petitioner] paid approximately $8,000 for the property acquired in 1959 and SGI paid approximately $5,000 for the property acquired in 1969. The evidence showed that SGI sold six individually buildable parcels of the property between 1959 and 1961." Pet. App. B12. Thus, the initial purchase price of the land at issue here was at most $13,000, less whatever amounts (which petitioner failed to establish at trial) SGI obtained from the sale of individual units within the original parcel. See also note 12, *supra*. Despite petitioner's oblique reference to the "fair market value of the property in its preregulated state" (Pet. Br. 37), petitioner has failed even to allege that his tract is worth less today than it was worth at some earlier point in time. The absence of evidence suggesting any diminution in value compels rejection of petitioner's takings claim.

1. The Supreme Court of Rhode Island treated the dissolution of SGI, and petitioner's consequent acquisition of title to the property, as a bona fide change in ownership, see Pet. App. A14, and it accordingly sustained the trial court's finding that petitioner "did not become the owner of the

parcel until 1978," *id.* at A15. The state court found that change in ownership to be an independent barrier to petitioner's takings claim; it explained that "when [petitioner] became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Ibid.* Although petitioner contests that aspect of the state court's analysis, he agrees (see, *e.g.*, Br. 43) that he acquired the property in 1978.

A transfer of real property from one owner to another typically occurs through a voluntary exchange for value. In that circumstance, we agree with the Supreme Court of Rhode Island that a regulatory takings claim ordinarily may not be predicated on a land-use restriction that predates the claimant's acquisition of the relevant property. The court's task in a regulatory takings case is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County*, 473 U.S. at 199; see pp. 9-10, *supra*. Before a restriction on the use of property can reasonably be equated with outright appropriation, the owner must at the very least offer proof that he has been deprived of a right or interest that he previously possessed. Enforcement of land-use regulations that predate the owner's acquisition of the property do not have that effect.

Nor would recognition of a takings claim in that circumstance serve the values that the Just Compensation Clause was intended to protect. "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). "[W]hile most burdens consequent upon government action under-

taken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (internal quotation marks and footnote omitted); see also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (taking may occur if individual landowners are "singled out to bear the burden of [the State's] attempt to remedy" larger public problems). An individual who *chooses* to acquire (*e.g.*, environmentally sensitive) property that is subject to heightened regulatory oversight cannot plausibly claim that he has been "forc[ed] * * * to bear public burdens" or "singled out" by the government for unfavorable treatment.[13]

In the instant case, petitioner's acquisition of the subject property occurred "by operation of law," Pet. App. A14, rather than through an exchange for value. It is therefore less clear than in the usual case that petitioner *voluntarily* accepted the constraints on wetlands development imposed by the CRMP (though petitioner as sole shareholder was ultimately responsible for SGI's failure to file required reports, and thus for the corporation's dissolution). On the other hand, the fact that petitioner acquired the tract by operation of law rather than through a bargained-for exchange undermines any argument that he has a legitimate

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[13] Petitioner relies in part (Br. 31-32) on cases holding that a recent purchaser of land may contest the validity of pre-existing restrictions on the use of the property. Petitioner errs, however, in analogizing an inverse condemnation suit to an attack on the validity of a zoning or other land-use regulation. The question whether a land-use restriction is lawful will rarely turn on whether the application of the rule is consonant with the expectations of a particular landowner. But the very essence of a claim for just compensation is the allegation that the government has "taken" a property right that the plaintiff previously possessed.

investment-backed expectation in being permitted to make a particular use of the property. Cf. *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987) (finding it "dubious" that persons who succeeded by inheritance to fractional interests in Indian allotments of which they made no active use had any "investment-backed expectations"). In any event, because the restrictions on wetlands development imposed by the CRMP were in place at the time that petitioner acquired the parcel, no right that petitioner ever possessed in the land has been "taken" from him.

That is particularly so in light of the fact that the State has not required that petitioner's land be left "economically idle." *Lucas*, 505 U.S. at 1019. Petitioner does not and cannot contend that the property has been rendered valueless or incapable of any beneficial use; his claim is simply that the property is worth much less than it would be under a less restrictive regulatory regime. If such a comparison could ever provide a basis for a meritorious takings claim (but see p. 22, *supra*), it could only be in a case where the enactment of use restrictions that postdate the claimant's acquisition of the property disrupts the claimant's own legitimate expectations and causes the property to be much less valuable than at the time he acquired it.[14]

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[14] Any effort to conduct the inquiry that petitioner advocates would also be likely to involve insuperable practical problems. The development restrictions imposed by the CRMP give all landowners in the area—including petitioner—a significant "reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415, by preventing the degradation of Winnapaug Pond and protecting the integrity of its adjacent resources. Cf. *Agins* v. *Tiburon*, 447 U.S. 255, 262 (1980) (rejecting plaintiffs' facial challenge to city zoning ordinances and observing that "[t]here is no indication that the [plaintiffs'] 5-acre tract is the only property affected by the ordinances," and that the plaintiffs "therefore will share with other owners the benefits and burdens of the city's exercise of its police power"). Petitioner surely could not establish a taking simply through proof that his tract would appreciate in value if *he* were permitted to engage in large-scale development while his neighbors remained subject to the CRMP's restrictions. Rather, any takings claim based on a comparative valuation

Petitioner contends both that (a) a landowner can demonstrate a "total" taking based on the effect of use restrictions that predate his ownership of the property, and (b) a "diminution" in value sufficient to establish a "total" taking can be established by comparing the property's current value not to its worth at some prior time, but to the hypothetical value it would have if an existing use restriction were eliminated. Acceptance of those propositions, taken together, would have extraordinary practical implications for land-use regulation. Petitioner's analysis logically implies that a person could purchase a tract of real property that was subject to pre-existing development restrictions (*e.g.*, land that was zoned for a particular use) and *immediately* establish a total taking simply through proof that the land would dramatically appreciate in value if the restrictions were eliminated. Nothing in this Court's decisions supports that result. Requiring the State to pay "compensation" in such cases would not protect individual landowners from being unfairly singled out for unfavorable treatment; it would offer windfall profits to persons who have suffered no actual injury as a result of longstanding regulatory restrictions, thereby encouraging speculators to game the system.

There is no occasion in this case, however, to consider whether (and, if so, in what circumstances) a taking may be found even though the restrictions on development predated the claimant's acquisition of the property. In this case, the restrictions in the CRMP codified, regularized, and formalized notice to landowners and the public of the application of principles that had long been reflected in Rhode Island's law of property and nuisance in the State's sensitive and hydrologically interconnected coastal areas. Indeed, the supe-

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theory would require an assessment of the value petitioner's tract would have if *all* landowners in the region were permitted to engage in unrestricted wetlands development. It seems unlikely that any workable methodology could be devised for conducting that highly speculative inquiry.

rior court specifically concluded that the filling of petitioner's 18 wetlands acres would have constituted a public nuisance. Furthermore, the wetlands to which those restrictions are applicable are manifestly not suited to residential development in their natural state, and, in stark contrast to *Lucas*, see 505 U.S. at 1008, there has been no widespread filling and development of the comparably situated wetlands surrounding Winnapaug Pond. At least in these circumstances, the existence of the statutory restrictions at the time of acquisition must defeat a takings claim.

2. For the foregoing reasons, petitioner himself suffered no taking of property through application to his 1985 development proposal of the restrictions contained in the CRMP. Petitioner contends (Br. 33-34), however, that a person who acquires property after a regulatory restriction has been imposed thereby acquires the right to pursue any regulatory takings claim that the *prior* owner might have asserted. In effect, petitioner argues that a potential regulatory takings claim must "run with the land," in order to avoid any possibility that a taking will go uncompensated if the person who owns the property at the time of a new regulatory restriction is forced to sell (or otherwise alienate) it before the takings claim ripens. But plainly no general rule exists that every potential constitutional claim must be freely assignable.[15]

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[15] *Nollan* (see Pet. Br. 22-23) is not to the contrary. In *Nollan*, the Court held that the California Coastal Commission had effected a taking by demanding an easement across the plaintiffs' beachfront property as a condition for permitting construction of a larger residence on the land. See 483 U.S. at 831-842. The Court held that the plaintiffs could assert a takings claim notwithstanding the fact that they had purchased the property after the Commission had begun to implement its easement policy. See *id.* at 834 n.2. The Court explained that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Ibid.* The "permanent physical occupation" of real property involved in *Nollan* (see *id.* at 831-832), however, constituted a per se taking without regard to its effect (or lack thereof) on the value of the land. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982). Petitioner's takings claim, by contrast, necessarily depends on proof that the property has (at the very least) suffered a drastic diminution in value. The existence of any such diminution is most appropriately determined by reference to the value of petitioner's tract at the time he acquired it.

In any event, even if petitioner's theory were otherwise sound, it would have no application to the instant case. Petitioner has entirely failed to establish that SGI—the prior owner of the subject property—had any takings claim to assign. Even accepting the dubious premise that a substantial diminution in the value of real property can effect a categorical taking, petitioner identifies no evidence suggesting that the State's adoption of the CRMP in 1977 had any immediate impact on the worth of the land.

The absence of such evidence is unsurprising. The State of Rhode Island had closely regulated development in coastal wetlands well before the promulgation of the CRMP. And as we explain above (see note 9, *supra*), the record in this case indicates that only minimal filling of wetlands has occurred in the area surrounding petitioner's tract. In 1971 the CRMC denied SGI permission to engage in development activities substantially similar to those described in petitioner's 1983 and 1985 permit applications. The CRMP is as a legal and practical matter the logical outgrowth of prior efforts—including both regulatory measures and common-law nuisance principles—by the State of Rhode Island to prevent exploitation of environmentally sensitive regions from impairing the interests of adjoining landowners and of the general public.[16] Nothing in the record here suggests

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[16] Insofar as the CRMP represents a codification of Rhode Island nuisance principles as applied to particular environmentally sensitive areas, its application to petitioner's tract would not effect a taking, even if the effect were to deny petitioner all economically beneficial use of the land. See *Lucas*, 505 U.S. at 1030 (explaining that it is "open to the State at any point to make the implication of * * * background principles of nuisance and property law explicit"). Codification of pre-existing nuisance

that the CRMP so dramatically altered the nature of the State's wetlands regulation as to undermine any legitimate expectations of SGI or effect a taking of SGI's property.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted.

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principles (and conferral of enforcement authority upon a state agency) may also enhance the individual landowner's "reciprocity of advantage" (see note 14, *supra*), by giving him greater assurance that other property owners will comply with restrictions intended to further the interests of the community.